



Issue Date: 15 July 2005

CASE NO.: **2005-SOX-00061**

In the Matter of

KIRK L. CLERMONT,
Complainant,

v.

CONAGRA FOODS,
Respondent.

DECISION AND ORDER – GRANTING MOTION TO DISMISS

This proceeding arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX” or “Act “). The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employee reasonably believes constitute violations of 18 U.S.C. § 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders.

Timeliness

The Act establishes the statute of limitations for a whistleblower’s complaint under SOX:

An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

18 U.S.C. §1514A(b)(2)(D). Likewise, the applicable regulations add:

Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed,, or have filed, by any person on the employee’s behalf, a complaint alleging such discrimination....

29 C.F.R. 1980.103 (d). Furthermore, the Department of Labor's commentary on § 1980.103 states:

[T]he alleged violation ... is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision.

Lawrence v. AT&T Labs and AT&T Corp., 2004-SOX-65, 4 (Sept. 9, 2004) (citing 69 Fed. Reg. No. 163, p. 52106 (August 24, 2004))

In Mr. Clermont's case, on April 21, 2005, the Regional Administrator of OSHA informed the parties that

On November 8, 2004, the Complainant's employment was terminated. On March 31, 2005, he filed this complaint. Pursuant to 18 U.S.C. §1514A, complaints are required to be filed, in writing, within 90 days of the alleged adverse action. As this complaint was filed more than 90 days after November 8, 2004, it is deemed untimely and no further action will be taken in this office.

On May 17, 2005, the Complainant filed an appeal with the Office of Administrative Law Judges. The case was assigned to this Administrative Law Judge, and in a conference call held on May 31, 2005, the Complainant was informed that the issue of a timely appeal would have to be addressed before the merits of the case could be considered.

Thereafter, on June 29, 2005, the Complainant submitted the following

1. Request withdrawal of the hearing before an Administrative Law Judge to appeal the initial finding.
2. Request dismissal of the appeal. This decision is based on the principle person fleecing corporate funds' termination of employment with ConAgra Foods. I have insufficient evidence to link any superior officers in the corporation in terms of actual payments. I also lack sufficient evidence to prove they had culpable knowledge (a paltry investigative effort is not enough). Lastly, though I have a whistleblower case on some level, I have failed to meet the reporting timeline.

Subsequently, the Respondent stated

Respondent supports Claimant's request to withdraw its request for a hearing and request for dismissal of his appeal. It appears that the only issue to be considered upon appeal is the timeliness of the filing of the initial complaint in this matter, since the only finding which was made at the conclusion of the investigation was that the complaint had not been timely filed. Since it appears

such filing was clearly outside the statute of limitations prescribed for such matters, and the Claimant did not, during the investigation, during the telephonic conference with the Chief Administrative Law Judge in this matter or in the “pleading” submitted today, offer any excuse or justifications for such failure to file, dismissal as a matter of law would have been appropriate even in the absence of the pleadings submitted today.

UPON THE FOREGOING, Respondent supports Claimant’s request and urges the Chief Administrative Law Judge to dismiss this matter, with prejudice.

Under the provisions of 20 C.F.R. § 1980.111(c), any party may withdraw its objections to the findings and preliminary order of the Assistant Secretary at anytime prior to the time the findings and an order of an administrative law judge become final. Clearly, Mr. Clermont’s Motion for Voluntary Dismissal has been filed in a timely manner. Further, approval of his request would terminate all proceedings before the Office of Administrative Law Judges.

The undersigned is aware that the Respondent has requested a dismissal with prejudice.

However, approval of Mr. Clermont’s dismissal request effectively removes his objection and request for an administrative law judges hearing. As the Regional Administrator previously advised the parties, in the absence of an objection and request for a hearing before an administrative law judge, the Regional Administrator’s findings and preliminary order becomes the Final Order of the Secretary of Labor. Accordingly, with these considerations in mind, I find approval of Claimant’s Motion for Voluntary Dismissal, which effectively withdraws his objection to the initial findings and preliminary order and his hearing request, is appropriate.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

NOTICE OF APPEAL RIGHTS

To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge’s decision with the Administrative Review Board (“Board”), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).